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No. 08-1240

Supreme Court, U.S.  
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**In The  
Supreme Court of the United States**

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STATE OF ARIZONA, EX REL. ANDREW P. THOMAS,  
MARICOPA COUNTY ATTORNEY,

*Petitioner,*

versus

SILVIA R. ARELLANO, JUDGE, SUPERIOR COURT  
OF ARIZONA, MARICOPA COUNTY,  
AND DENNIS RICCITELLI,

*Respondents.*

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**On Petition For Writ Of Certiorari  
To The Arizona Court Of Appeals**

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**RESPONDENT'S BRIEF IN OPPOSITION**

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MICHAEL D. KIMERER  
(*Counsel of Record*)

KENNETH F. HULS

KIMERER & DERRICK, PC  
221 East Indianola Avenue  
Phoenix, Arizona 85012  
Telephone: (602) 279-5900

*Counsel for Respondent Riccitelli*

## QUESTIONS PRESENTED

Respondent Dennis Riccitelli is an ordained priest of the Roman Catholic Church and was the pastor of Holy Cross Catholic Church. Riccitelli was indicted on ten counts of theft and four counts of fraudulent schemes and artifices. The Catholic Church is the alleged victim. Riccitelli filed a motion to remand the case to the grand jury for a new probable cause determination. Among other claims, he asserted that the State failed to instruct the grand jury on applicable canon law and Diocesan policy and procedure. The Respondent Judge granted Riccitelli's motion and remanded the matter to the grand jury for a new determination of probable cause. Along with other instructions, Respondent Judge ordered the State to instruct the grand jury on both applicable canon law and Diocesan policy and procedure. Ten months later, the State first raised the Questions Presented in the form of a motion to clarify the order, which was denied by the Respondent Judge. The Arizona Court of Appeals and the Supreme Court of Arizona both denied the State relief from the Respondent Judge's order.

The issues presented for review by Petitioner are:

1. The Establishment Clause of the First Amendment prohibits government action which does not have a secular purpose and which is excessively entangled with religion. Did the Respondent Judge's

**QUESTIONS PRESENTED – Continued**

order violate the Establishment Clause by entangling church doctrine and policy with the required grand jury instructions?

2. The Equal Protection Clause of the Fourteenth Amendment prohibits, *inter alia*, denying citizens equal protection under the law. Did the Respondent Judge's orders violate the Equal Protection Clause by providing Riccitelli with special rights and criminal defenses based upon his religious affiliation?

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## OPINION BELOW

The Respondent Judge, who is a judge of the Maricopa County Superior Court, along with other instructions, ordered the State to instruct the grand jury on applicable canon law and Diocesan policy and procedure for consideration in determining whether probable cause exists to indict Riccitelli for theft and fraudulent schemes against the Catholic Church based on his handling of parish financial matters. The Respondent Judge found that evidence of applicable canon law and Diocesan policy and procedure was clearly and directly relevant because the grand jury was asked to determine whether Riccitelli exceeded the authority granted him under church policies and law, and if so, whether in so doing he violated Arizona law. The Respondent Judge found that the failure to present evidence of applicable canon law and Diocesan policy and procedure constituted the deprivation of a substantial procedural right. The State challenged the ruling arguing that canon law and Diocesan policy and procedure are neither secular law nor clearly exculpatory evidence which the State would be required to present to the grand jury. The Arizona Court of Appeals and the Supreme Court of Arizona both denied relief. Subsequently, and ten months after the Respondent Judge issued her order remanding the matter for a new determination of probable cause, the State first raised the Questions Presented in the form of a motion to clarify the order by asserting that the original order violated the Establishment and Equal

Protection Clauses. The Respondent Judge denied the motion, and again both the Arizona Court of Appeals and the Supreme Court of Arizona denied the State relief.

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### **STATEMENT OF JURISDICTION**

The Arizona Supreme Court filed its decision denying review on January 6, 2009. Petitioner filed its writ timely within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, § 2; 28 U.S.C. § 1257(a).

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### **CONSTITUTIONAL PROVISIONS**

The First Amendment to the United States Constitution provides in part that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

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### STATEMENT OF THE CASE

On December 21, 2004, Respondent Dennis Riccitelli was indicted on one count of theft, a class 2 felony, eight counts of theft, class 3 felonies, one count of theft, a class 5 felony, and four counts of fraudulent schemes and artifices, class 2 felonies. The alleged offenses are alleged to have occurred between January 1, 2001, and December 31, 2003. At that time, Riccitelli was an ordained priest of the Roman Catholic Church and pastor of Holy Cross Catholic Church. In indicting Riccitelli, the State alleged that Riccitelli exceeded his discretion and authority in financial matters at Holy Cross Parish.

On February 4, 2005, Riccitelli filed a Motion to Remand for New Determination of Probable Cause, and requested an extension of time to file a supplemental, substantive motion. On February 8, 2005, the trial court granted Riccitelli leave to "supplement the motion as needed."

On May 14, 2007, Riccitelli filed a Motion to Dismiss Indictment or in the Alternative to Remand for a New Determination of Probable Cause. (Petitioner's App. E). Among other claims, Riccitelli argued that the State presented false, misleading, and incomplete testimony regarding canon law, Diocesan policy and procedure, and the pastor's role in parish



financial matters, failed to instruct and accurately instruct the grand jury on relevant canon law and Diocesan policy and procedure, and impermissibly interfered with questioning by the grand jurors on these issues.

The State filed a written response, objecting to the motion, but failed to raise either of the Questions Presented.

On July 6, 2007, the Respondent Judge remanded the case for a new determination of probable cause by the grand jury. (Petitioner's App. C). Among other findings of error, the Respondent Judge found that:

[The] State failed to instruct the grand jurors on Cannon [sic] Law and Diocesan Policy and Procedure. The relevance of the evidence is clear; the grand jurors were required to make a determination of whether Defendant Riccitelli's conduct exceeded the authority granted him by church policies and law, and if so, did Defendant's conduct violate Arizona law. Church law and policies are directly relevant in determining whether Defendant committed the crimes he is charged with, that is, whether Defendant exceeded his authority in dealing with church financial matters.

(*Id.* at 8).

On August 2, 2007, Riccitelli filed a Motion to Dismiss for failure of the State to file a complaint or commence grand jury proceedings within 15 days of

the Respondent Judge's remand order of July 6, 2007. Riccitelli argued that although he had been indicted by a county grand jury and not a state grand jury, the Arizona rule requiring the filing of a complaint or commencement of grand jury proceedings within 15 days of a remand order in state grand jury matters should apply. The State filed its objection, and the Respondent Judge denied Riccitelli's motion.

The State then filed its first Motion to Clarify Order on October 3, 2007, requesting that Respondent Judge clarify her remand order of July 6, 2007, by specifically asking the court to clarify whether it found that the intentional and unintentional false, misleading and incomplete testimony of one of the State's witnesses at the grand jury was in violation of law and/or an issue under *Brady*, or whether the testimony offered was an issue of officer competency. The State did not raise either of the Questions Presented at that time.

On September 12, 2007, the State filed its first Petition for Special Action contesting Respondent Judge's remand order of July 6, 2007. The Arizona Court of Appeals declined jurisdiction and the Supreme Court of Arizona subsequently denied the State's Petition for Review.

On May 5, 2008, the State filed its second Motion for Clarification of Order; first raising the Questions Presented ten months after the remand order in question was issued by Respondent Judge and after having already sought interlocutory relief from both

the Arizona Court of Appeals and the Supreme Court of Arizona. (Petitioner's App. F'). In this second Motion to Clarify, the State requested that Respondent Judge "reconsider and clarify" her order. (*Id.* at 72).

On May 19, 2008, the Respondent Judge denied the State's second Motion to Clarify. (Petitioner's App. B). In so doing, the Respondent Judge noted that the State did not argue that the remand order was ambiguous or confusing, but rather, the State asked that the court reverse its ruling. (*Id.* at 5). The Respondent Judge found that the State's second Motion to Clarify was "in actuality a Motion for Reconsideration" and treated it as such. (*Id.*).

The State again filed a Petition for Special Action in the Arizona Court of Appeals. (Petitioner's App. G). Again, the Court of Appeals declined to accept jurisdiction. Subsequently, the State filed its Petition for Review, which was denied by the Supreme Court of Arizona on January 6, 2009. (Petitioner's App. D).

Respondent Riccitelli posted a substantial bond at the inception of this case and remains on supervised release. His United States passport was surrendered pending resolution of the matter.

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**REASONS WHY THE WRIT  
SHOULD BE DENIED**

The Respondent Judge's order has a secular purpose, does not foster excessive entanglement with

religion, and does not provide Riccitelli with special rights based on his religious affiliation. Accordingly, the order does not violate the Establishment and Equal Protection Clauses as asserted by the State. The order directs the State to instruct the grand jury on the relevant and necessary facts of the case in order to make a purely secular decision. Those facts are the authority granted Riccitelli in financial matters under church policy, procedure and law. Without knowledge of that authority, it is impossible for the grand jurors to determine whether there is probable cause to conclude that Riccitelli violated state law by exceeding his authority. The canon law and Diocesan policy and procedure are necessary facts for consideration in making the purely secular decision of whether state law was violated. All findings will be secular, avoiding excessive entanglement with religion.

The Respondent Judge did not single out Riccitelli for special defenses and rights any more than if she had instructed the State to inform the grand jury of the authority granted a chief financial officer by the bylaws of a corporate employer in a similar case with a secular corporate business victim.

The State expresses concern that this order will permit Muslim suspects to invoke Sharia law or members of certain sects of Latter-Day Saints to invoke their doctrine in defending against charges of spousal abuse or child molestation. Though the State does not specify what concern it has with regard to Muslims and Sharia law, presumably Petitioner is concerned with such defenses in cases of terrorism,

polygamy, or spousal abuse. Murder, spousal abuse, polygamy, and molestation are against the secular laws of this land. Whether a church's law, policy, or procedure permits those acts to be committed by its clergy or members is irrelevant under secular law. However, when a church employs a cleric and entrusts him with financial responsibilities, the parameters of his authority as defined by his employer become relevant in determining whether secular law was violated in his handling of his employer's financial matters if it is alleged that he committed a crime by exceeding his authority.

The State claims a violation of the Equal Protection Clause because the State has not been ordered to instruct the grand jury on church law, policy and procedure when non-clergy defendants were charged with offenses against a church. However, if a layperson were employed by a church and entrusted with financial responsibilities with respect to the employer church's funds, then the employer church's guidelines for the authority placed in that person would become relevant and necessary in order to determine whether the accused violated state law by exceeding her authority and thereby committed theft or fraud. There are no special rights conferred by this order, only relevant facts for the grand jury to consider.

- I. **Certiorari is not warranted because the Establishment Clause of the First Amendment is not violated when the Respondent Judge's remand order serves a secular purpose and does not foster excessive entanglement of grand jury proceedings with religion where the order directs the State to provide the grand jurors with the relevant facts necessary to make a secular determination under state law.**

It is an undisputed fact that Riccitelli was and remains an ordained priest of the Roman Catholic Church. The State alleges that he stole from the parish that was entrusted to his care by exceeding his authority in dealing with the parish's financial matters. The Respondent Judge simply agreed with Riccitelli that in order to determine whether probable cause existed as to whether he had exceeded his authority in financial matters and in so doing committed a criminal offense under state law, the grand jury would have to know what his authority was. That authority is outlined in canon law and Diocesan policy and procedure.

In her order of July 6, 2007, the Respondent Judge ruled that:

The relevance of the evidence is clear; the grand jurors were required to make a determination of whether Defendant Riccitelli's conduct exceeded the authority granted him by church policies and law, and if so, did Defendant's conduct violate Arizona law.



Church law and policies are directly relevant in determining whether Defendant committed the crimes he is charged with, that is, whether Defendant exceeded his authority in dealing with church financial matters.

(Petitioner's App. C at 8).

The Respondent Judge's ruling and her reasoning were correct and avoid any violation of the Establishment Clause. The State alleged in counts 1, 3, 4, 5, 7, 8, 9, 11, 12, and 14 of the indictment that Riccitelli "without lawful authority, knowingly" either "obtained" or "controlled" the alleged victim parish's money. The grand jurors are unable to determine whether there is probable cause to believe that Riccitelli exceeded his authority without knowing what his authority was. He cannot have stolen from and defrauded his parish unless he exceeded his authority according to the rules governing his conduct and in so doing violated the laws of the State of Arizona.

As a practical matter, the State recognized this in its presentation to the grand jury. The State presented false, inaccurate and incomplete references to canon law and Diocesan policy and procedure in securing the indictment. (*See generally* Petitioner's App. E). The State cannot have it both ways and must present the applicable standards of Riccitelli's authority in an accurate and complete fashion.

Advising the grand jurors as ordered by the Respondent Judge serves a secular purpose. The

secular purpose is to provide the grand jurors with the relevant and necessary facts in order to determine whether Riccitelli exceeded his authority in managing and spending his employer's funds, and in so doing whether he violated secular law. Given that relevant canon law and Diocesan policy and procedure are necessary facts, and all findings will be made under secular law, there is no excessive entanglement with religion.

The State cites many cases in support of its argument that the Respondent Judge's order fosters excessive entanglement with religion. (See Petition at 11-13). However, the matter at hand is readily distinguished. Riccitelli and the Respondent Judge do not ask the courts to decide a lawsuit between a person or clergy and his church. No one is asking the grand jurors to interpret canon law and church policy and procedure as the final determination for resolution of a legal dispute. The grand jurors are not to be asked to pass on the propriety or legality of canon law and Diocesan policy and procedure. Following the Respondent Judge's order would not require the grand jury to determine whether Riccitelli could be prosecuted under canon law. Rather, the order requires that the State present the standards of Riccitelli's authority in parish financial matters so the grand jurors can determine whether he exceeded that authority, and in so doing whether he acted "without lawful authority" and violated Arizona law as alleged by the State.

The State's citation of *State of North Dakota v. Burckhard*, 579 N.W.2d 194 (N.D. 1998) is curious. In



that case involving a Roman Catholic priest and alleged theft from his parish, the Supreme Court of North Dakota found no excessive entanglement of government and religious affairs and therefore no violation of the First Amendment in the court's exercise of jurisdiction over the criminal matter. (*Id.* at 195). Riccitelli has made no claim that the First Amendment of the United States Constitution bars prosecution, and the Respondent Judge has not so ordered. Moreover, and as noted by the State, that court found "[a]s in any theft case involving allegations the defendant misused funds entrusted to him, the State will need to produce evidence, through testimony of church officials or other appropriate means, of the authority entrusted to the defendant and conduct outside of authority." (*Id.* at 201). This is precisely what was ordered by the Respondent Judge.

If Riccitelli were the chief financial officer of a corporation, the corporation would have rules defining his authority to use and dispose of corporate funds. No one would argue that the grand jurors should not be advised of the parameters of his authority in order to determine if he exceeded that authority and in so doing committed a criminal act. That Riccitelli was employed by a church and not a typical corporation, and the rules defining his authority were therefore church rules, makes no difference. To hold otherwise would be to hold Riccitelli to a different standard and would provide no reasonable basis for the grand jurors to determine whether Riccitelli acted "without lawful authority" in violation of state law.

Referring the grand jurors to the rules that determine Riccitelli's authority neither establishes a religion nor prohibits the free exercise thereof.

**II. Certiorari is not warranted because the Equal Protection Clause of the Fourteenth Amendment is not violated by the Respondent Judge's remand order when the order directs the State to provide the grand jurors with the necessary facts to determine whether Riccitelli exceeded the authority granted him by his employer church in financial dealings with church funds and in so doing violated state law. No special class is created, and no special rights and defenses based on religious affiliation are conferred.**

The State alleges that Respondent Judge's remand order violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by denying citizens equal protection under the law. The State argues that the order provides Riccitelli with special rights and defenses based upon his religious affiliation because the State is not ordered to similarly instruct the grand jury on canon law and Diocesan policy and procedure when non-clergy defendants are charged with offenses against the church. The State fails to understand that it is not Riccitelli's religious affiliation that makes canon law and Diocesan policy and procedure relevant, but

the fact of his employment, which happens to be with a church.

Canon law and Diocesan policy and procedure are the rules that govern Riccitelli's employment. They are the regulations that outline his authority to handle, manage and spend his employer's funds. There is no argument under canon law and Diocesan policy and procedure that the parish priest is immune from prosecution for criminal theft or fraud in his handling of parish finances. There are no special defenses or rights based on religious affiliation, but based on his employment there are relevant and necessary facts for the grand jury to consider. Canon law and Diocesan policies and procedures are necessary facts for the grand jurors' consideration in determining whether Riccitelli exceeded the authority granted him by his employer and in so doing violated state law.

Similarly, if a layperson were employed by a church and entrusted with financial responsibilities with respect to the employer church's funds, then the employer church's rules, policies, and procedures defining the authority placed in that person would likewise become relevant and necessary in order to determine whether the accused layperson exceeded her authority and in so doing committed theft or fraud. Therefore, no special class has been created by the Respondent Judge's order. Religious affiliation is not the issue, the authority conferred on the accused by his employer is. There are no special rights

conferred by this order, only relevant facts for the grand jury to consider.

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## CONCLUSION

The underlying remand order by the Respondent Judge does not violate the Establishment and Equal Protection Clauses as asserted by the State because the Respondent Judge's order has a secular purpose, does not foster excessive entanglement with religion, and does not provide Riccitelli with special rights based on his religious affiliation. The order simply directs the State to instruct the grand jury on the relevant and necessary facts of the case in order to make a purely secular decision. Those facts are the authority granted Riccitelli by his employer in financial matters under church policy, procedure and law. The secular purpose is clear. That purpose is to let the grand jurors have the relevant facts that are necessary to the determination of whether state law was violated. Without knowledge of the authority granted Riccitelli by his employer in financial matters, it is impossible for the grand jurors to make the legal decision as to whether there is probable cause to conclude that Riccitelli exceeded his authority and in so doing violated state law. All findings will be secular, avoiding excessive entanglement with religion. The Respondent Judge did not single out Riccitelli for special defenses and rights any more than if she had instructed the State to inform the grand jury of the authority granted a chief financial

officer under the bylaws of a corporate employer in a similar case with a secular corporate business victim. Religious affiliation is not the issue, the authority conferred on the accused by his employer is.

Respectfully submitted,

MICHAEL D. KIMERER  
*(Counsel of Record)*

KENNETH F. HULS

KIMERER & DERRICK, PC  
221 East Indianola Avenue  
Phoenix, Arizona 85012  
Telephone: (602) 279-5900

*Counsel for Respondent Riccitelli*